

7/5/2020

Umbrella Guidance and Clarity on Supply Teachers.

Dear all,

I propose to set out some guidance that we have provided to Umbrella Companies over the last week.

“For the purposes of calculating the reference pay, employers should include all the regular payments that they are obliged to make, following the published online guidance on how to “Work out 80% of your employees' wages to claim through the Coronavirus Job Retention Scheme”.

Variable payments that are specified in a contract and are always paid in reality can be included within the reference salary for calculating the subsidised furlough pay grant.

Whether a particular payment, made in the reference period, should be included in the gross pay grant calculation depends on whether it was a discretionary payment. The written terms of the employment contract are the starting point for assessing whether a payment was discretionary. Where there was no written contract the Statement of Employment Particulars provided under S.1 of the Employment Rights Act 1996 should be used. An employer should only include payments to which the employee had an enforceable right.

The scheme covers “zero-hour” employment contracts or other situations where the employee or employer have a choice about how many hours they will work, so long as the payment made by the employer for any hours worked was non-discretionary.

All of the money claimed to cover an employee’s subsidised furlough pay under CJRS must be paid over to the employee - it cannot be retained by the employer”

There was then a further set of clarity provided to support understanding especially on the subject of “discretionary payments or bonus” that read

“this matter is for customers to resolve, through their own processes and taking into account any legal advice as appropriate – it is not possible for HMRC to determine ahead of time whether any particular bonus payment is discretionary or not, because the wording of the contract and the actual contractual relationships in play vary considerably among different employers.

Customers should bear in mind that variable payments that are specified in a contract and are always paid in reality can be included within the reference salary for calculating the subsidised furlough pay grant. Customers should also be aware that a payment could be non-discretionary even if labelled otherwise in the written contract. As with all tax decisions, HMRC expects customers to take reasonable care to comply with their obligations.

Supply Teachers and Furlough

The question here was whether a supply teacher could be furloughed during school holidays and how this interacted with Section 6.5 of the treasury guidance note. So, to summarise previous advice was as follows

“Providing the Scheme criteria are met (see the Treasury’s Direction of 15 April 2020 setting out the Scheme details) then agency workers in the education sector can be furloughed for periods which include school holidays.”

And the question was how this sits with the following:

6.5 No claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after 19 March 2020 (whether agreed or otherwise arranged conditionally or unconditionally on, before or after that day).

Answer:

It is not a criteria of the scheme to consider whether a given employee would have been expected to have been earning during a furlough period, if they had not been on furlough. Fixed-term contracts can be extended without reference to any hypothetical work that may or may not have been going on during the extended period. The exception is the bit about sabbaticals or other agreed periods of unpaid leave, during which the employee cannot be eligible.

Thus, supply teachers are able to get furlough during the school holidays. It’s not sabbatical or unpaid leave – it’s a period where they might not have been able to get work. There seem to be parallels with the fixed-term contract situation, where HRMC are also paying people for a period when they weren’t necessarily guaranteed to be in employment, but we reasonably believe the employment they might have gotten would have been stopped by Covid-19.

In summary, as you were, Supply teacher can be furloughed during periods that are traditionally school holidays.



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